Supreme Court, U.S.
FILED

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No.

IN THE
Supreme Court of the United States

PHILLIP VAN AELSTYN,
PETITIONER,

V.

THE STATE OF VERMONT,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF
THE STATE OF VERMONT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a trial court needs to conduct an on the record inquiry of a defendant who seeks to waive his Constitutionally-protected right to counsel in order to determine if his waiver is knowing, intelligent and voluntary.

PARTIES TO THE PROCEEDING

Petitioner, who was the Defendant in the Supreme Court of Vermont, is Philip Van Aelstyn.

Respondent is the state of Vermont.

There are no corporate parties to this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

JURISDICTION 2

CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 8

I. The Court Should Grant the Writ to Decide Whether a State Court Must Make an Inquiry on the Record as to Whether a Defendant has Made a Knowing, Intelligent and Voluntary Waiver of his Right to Counsel.....8

A. In *Faretta,* this Court required that a Defendant Make a Knowing and Intelligent Waiver of his right to Counsel.....9

B. There is a Split of Authority Over Whether a Knowing and Intelligent Waiver of Counsel Requires an Explicit Warning from the Court.....11

II. The Court Should Grant the Writ to Determine if the Vermont Supreme Court Decided the Question of Whether a Waiver of the Right to Counsel Occurred in a Way that Conflicts with Nearly Every United States Court of Appeals.....19

CONCLUSION.....21

TABLE OF AUTHORITIES

CASE LAW **PAGE**

Buhl v. Cooksey,
233 F.3d 783 (3rd Cir. 2000).....20

Dallio v. Spitzer,
343 F.3d 553 (2nd Cir. 2003).....12, 13, 18

Faretta v. California,
422 U.S. 806 (1975).....9, 10

Johnson v. Zervst,
304 U.S. 458 (1938).....9

Moreno v. Stewart,
171 F.3d 658 (9th Cir. 1999).....11, 12

Stano v. Dugger,
921 F.2d 1125 (11th Cir. 1991).....20

State v. Langley,
109 Idaho 119, 705 P.2d 1074 (Ct.App. 1985).....17

State v. Nichols,
207 S.W. 3d 215 (Mo.App. S.D. 2006) 17

State v. Worthy,
583 N.W. 2d 270 (Minn. 1998).....17

United States v. Bailey,
675 F.2d 1292 (D.C. Cir. 1982) 16

United States v. Bell,
901 F.2d 574 (7th Cir. 1990).....13

United States v. Cromer,
389 F.3d 662 (6th Cir. 2004).....16, 13, 20

United States v. Davis,
269 F.3d 514 (5th Cir. 2001).....12, 14

United States v. Hafen,
726 F.2d 21 (1st Cir. 1984).....13

United States v. Hughes,
191 F.3d 1317 (10th Cir. 1999).....14

United States v. McDowell,
814 F.2d 245 (6th Cir. 1987) 16

United States v. Peppers,
302 F.3d 120 (3rd Cir. 2002).....16

United States v. Singleton,
107 F.3d 1091 (4th Cir. 1997).....14

Williams v. Bartlett,
44 F.3d 95 (2nd Cir. 1994).....21

RULES

U.S. Sup.Ct.Rule 10.....9

REFERENCES

1 Bench Book for United States District Judges,
1.02-2 to -5 (3d ed. 1986) 15

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Philip van Aelstyn, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Vermont entered on January 12, 2007.

OPINION BELOW

The Supreme Court of Vermont issued its opinion on this case on January 12, 2007. A copy of that opinion is attached as Appendix A. The Court's opinion is published at 917 A.2d 471.

JURISDICTION

The Supreme Court of Vermont issued its decision in this case on January 12, 2007. A copy is attached as Appendix "A". The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(a).

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. XIV, sec. 1:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Philip van Aelstyn ("the Petitioner"), a Vermont Attorney who had moved to California, was convicted of two counts of extortion and one count of stalking following a jury trial in the District Court, Unit 2, Chittenden County of Vermont. (App. A–1-2).

After his arraignment in February of 2004, Mr. van Aelstyn hired an attorney to represent him. On August of 2004, this attorney filed a motion to withdraw from Mr. van Aelstyn's case. Mr. van Aelstyn then filed a limited *pro se* Appearance to address counsel's request to withdraw. The court conducted a hearing on the motion and allowed counsel to withdraw even though Mr. van Aelstyn had expressed concern regarding the deadline for motions and discovery not being extended. (App. A-2).

The following month, in September of 2004, Mr. van Aelstyn hired a second attorney to represent him. In October of 2004, this second attorney filed a motion to withdraw from

his case. This motion was granted. Mr. van Aelstyn filed a Notice of Limited *pro se* Appearance to respond to the withdrawal motion and to move the court to continue a scheduled status conference. (App. A-2). Mr. van Aelstyn represented to the Court that he intended to retain counsel despite financial limitations. (App. A-2).

Mr. van Aelstyn filed a Notice of *Pro Se* Appearance on November 29, 2004 which was in response to the state's refusal to communicate with him until he entered such an appearance. (App. A-2). Nine days later, on December 7, 2004, Mr. van Aelstyn, telephoned the court to request a public defender application form. On December 10, 2004, Mr. van Aelstyn filed three additional motions including a motion to appoint a public defender. (App. A-3). In this motion, he identified his lack of counsel as an outstanding issue. (App. A-5). The Court denied Mr. van Aelstyn's request for a public defender noting only that, "Defendant has indicated his intent to proceed *pro se*." (App. A-3). On

December 15, 2004, Mr. van Aelstyn filed a motion to prevent bail forfeiture and again identified his lack of counsel as an outstanding issue. (App. A-6). The court did not find Mr. van Aelstyn's conduct so equivocal after entering his appearance to require a colloquy. (App. A-6-7).

On January 18, 2005, the court held the jury draw. At the jury draw Mr. van Aelstyn did not raise the issue of his representation. (App. A-7). Mr. van Aelstyn proceeded through the jury draw and then proceeded through the trial representing himself. Mr. van Aelstyn was never explicitly asked about his waiver on the record nor was he ever informed, on the record, of the risks of appearing *pro se*. The jury returned guilty findings on all counts. (App. A-4). Mr. van Aelstyn was convicted of two counts of extortion and one count of stalking and was sentenced on May 13, 2005. (App. A-2, 4).

Mr. van Aelstyn appealed to the Supreme Court of Vermont and argued that the district court failed to determine

whether he intended to waive his right to counsel before the case went to trial. (App. A-2). He argued that he was forced to proceed *pro se* without a valid waiver of his constitutional right to counsel. (App. A-4). In determining whether the waiver was made knowingly and voluntarily, the Supreme Court of Vermont examined the background, experience, and conduct of the accused and considered the facts that Mr. van Aelstyn had practiced law in both Vermont and California, with a focus on land transactions, had hired two attorneys, complained about their diligence and ability and sought a continuance to obtain a third attorney. (App. A-9). The Supreme Court of Vermont further reasoned that the pre-trial motions filed by Mr. van Aelstyn, both substantive and procedural, demonstrated an understanding of charges against him and the serious penalties in the events of a conviction. (App. A-9). The Supreme Court of Vermont held that his background, training and experience qualified him to make a choice that was with full knowledge of its consequences and

that his waiver was made knowingly and voluntarily (App. A-9-10). The Supreme Court of Vermont held that an inquiry into a defendant's waiver of counsel is not required when it is apparent that the defendant understands the right to counsel. (App. A-5). Based on this, in the state of Vermont a colloquy can be replaced by facts and circumstances to determine if the waiver was knowing and intelligent. The Supreme Court of Vermont explained that to proceed without a colloquy, the understanding and intent must be clear and it can not be justified by silence or other equivocal conduct. (App. A-5). While the Supreme Court of Vermont held in order to proceed without a colloquy, an understanding and intent must be clear however, the Court never set out any guidelines by which to determine the clarity of the defendant's understanding and intent. The Petitioner now seeks a writ of certiorari on the important issue presented in this case.

REASON FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE WRIT TO DECIDE WHETHER A STATE COURT MUST MAKE AN INQUIRY ON THE RECORD AS TO WHETHER A DEFENDANT HAS MADE A KNOWING, INTELLEGENT AND VOLUNTARY WIAVER OF HIS RIGHT TO COUNSEL

The Vermont Supreme Court held that, although it is "better practice" to hold an on the record colloquy as to whether a defendant has made a knowing and intelligent waiver of his right to counsel, such knowledge, nonetheless, can be inferred from the circumstances. (App. A-9-10). Such an approach is fraught with peril, however, particularly in cases such as this in which the record concerning the defendant's desire to proceed *pro se* is far from unambiguous. *See Section II, infra.* Moreover, there is a split among the Circuits as to whether such an on the record inquiry is constitutionally required or merely advisable. This perceived ambiguity also has resulted in a split among state

courts that have addressed this issue. This Court should grant certiorari because this important question of federal law is subject to an intractable split of authority in the lower courts, and has not been, but should be, resolved by this Court. U.S. Sup.Ct.Rule 10.

A. In *Faretta* This Court Required that a Defendant Make a Knowing and Intelligent Waiver of His Right to Counsel

In the landmark case of *Faretta v. California*, 422 U.S. 806 (1975), this Court found that, under the Sixth Amendment to the United States Constitution, a defendant has the right to self-representation. Since the right to counsel is guaranteed under the Sixth Amendment, any waiver of this right must be made 'knowingly and intelligently.' *Id.* At 835; *Johnson v. Zerbst*, 304 U.S. 458, 464-465 (1938). In order to conclude that a defendant's waiver of counsel is knowing and intelligent, this Court counseled that a defendant, "*should* be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he

knows what he is doing and his choice is made with his eyes open.'" *Faretta* at 835; *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). (Emphasis added). The fact that this Court said that a defendant "should" be made aware of the dangers of self-representation has given rise to the question as to whether a defendant affirmatively must be made aware of such dangers by the court on the record, or whether a court can find that a defendant made a knowing and intelligent waiver based simply on the circumstances surrounding the defendant's conduct before and during trial. This Court should grant certiorari to resolve any ambiguity surrounding this important issue of constitutional law and hold that a knowing and intelligent waiver of the right to counsel requires an on the record inquiry and colloquy between the defendant and the court.

B. There is a Split of Authority Over Whether a Knowing and Intelligent Waiver of Counsel Requires an Explicit Warning from the Court

The *Faretta* decision produced a range of responses from the various Circuits that have addressed the issue. Even prior to this Court's decision in *Faretta*, the Ninth Circuit required district courts to make an affirmative finding that a defendant had made a knowing and intelligent waiver of his right to counsel. *Moreno v. Stewart*, 171 F.3d 658, 660-661 (9th Cir. 1999). Following *Faretta*, the Ninth Circuit repeatedly clarified that, "a district court should not grant a defendant's request to waive representation by counsel and serve as his own counsel, without discussing with the defendant in open court, whether the waiver was knowingly and intelligently made, with an understanding of the possible penalties, and the dangers of self-representation." *Moreno*, 171 F.3d at 661. Nonetheless, since this was only the preferred procedure that "should" be followed, the Ninth Circuit carved out a narrow exception for circumstances in

which "the record as a whole" indicated a knowing and intelligent waiver. Moreover, the Ninth Circuit refused to extend to the state courts the requirement that a court discuss with a defendant the danger of making such a waiver because it believed that such a procedure was not "constitutionally compelled" under *Faretta*. *Id.*

Similarly, the Second Circuit has found that *Faretta's* reference to what a court "should" do in making a waiver record was not controlling Supreme Court law but simply dictum. *Dallio v. Spitzer*, 343 F.3d 553, 563 (2nd Cir. 2003). Thus, warnings by the district court were simply a factor (albeit an important one) in determining if a waiver was knowing and intelligent, and could be considered as part of a "totality of the circumstances" analysis. *Id.* at 563. Inasmuch as it viewed such warnings as being part of the Court's dictum in *Faretta*, it refused to find that state courts were constitutionally required to conduct such inquiries. *Id.* at 564. Nonetheless, the Second Circuit noted it precedents on this

topic, "appeared to send mixed signals," to lower courts attempting to wrestle with the issue. *Id.* at 563-564.

Despite this very real risk of sending "mixed signals" to lower courts, several Circuits while expressing a clear preference for administering on the record *Faretta* warnings, nonetheless, have adopted a totality of the circumstances analysis to determine of a waiver of counsel was knowing and intelligent. *See, e.g. United States v. Bell*, 901 F.2d 574, 576-577 (7th Cir. 1990)(expressing "strong preference" for a formal waiver inquiry but finding no reversible error if totality of circumstances reveals a knowing and intelligent waiver); *United States v. Hafen*, 726 F.2d 21, 26 (1st Cir. 1984)("Although the practice of issuing specific warnings to defendants who wish to proceed *pro se* is a good way ...to ensure that the requirements of Faretta are met, it is not the *only* way.")(Emphasis in original); *See also, United States v. Hughes*, 191 F.3d 1317, 1323-1324 (10th Cir. 1999); *United States v. Singleton*, 107 F.3d 1091, 1097 (4th Cir. 1997).

The Fifth Circuit has "consistently required trial courts to provide *Faretta* warnings," but noted that it required "no sacrosanct litany for warning defendants against waving the right to counsel." *United States v. Davis*, 269 F.3d 514, 518-519 (5th Cir. 2001). Thus, although *some* warning is required, the exact nature and wording of the warning depend "on the circumstances of the individual case." *Id.* at 519.

The case at bar, perfectly illustrates the confusion caused by the majority approach of preferring explicit *Faretta* warnings while still accepting a totality of the circumstances analysis. The Vermont Supreme Court cited the *Harris* case from the Ninth Circuit is support of its use of a facts and circumstances analysis to determine if the defendant made a knowing and intelligent waiver of counsel. (App. A-8), *United States v. Harris*, 683 F.2d 322, 325 (9th Cir. 1982). Yet, in the same sentence, it also quoted the Fifth Circuit's admonition in *Davis* that "we [the Vermont

Supreme Court] 'require no sacrosanct litany for warning defendants against waiving the right to counsel.'" (App. A-8). In so doing, however, the Vermont Supreme Court ignored the Fifth Circuit's explicit requirement in *Davis* that some type of Faretta warning be given. *See* (App. A-8); *Davis* at 518-519. Thus, it would appear that the Second Circuit's fear of sending mixed signals to other courts by merely preferring a *Faretta* warning was prescient.

In contrast, the Sixth Circuit, seeking to eliminate the dangers posed by such ambiguity, and relying on its "supervisory powers," developed a "rather lengthy series of questions from 1 *Bench Book for United States District Judges* 1.02-2 to -5 (3d ed. 1986) that a district court should ask in order to ensure that a defendant's waiver of counsel is knowing and intelligent." *United States v. Cromer*, 389 F.3d 662, 680 (6th Cir. 2004); *United States v. McDowell*, 814 F.2d 245, 247, 250 (6th Cir. 1987). In order for such a waiver to be valid, "substantial compliance" with the series of

questions set forth is required. *Cromer* at 680. Similarly, the D.C Circuit has invoked its supervisory powers to require that a district court "mak[e] clear on the record" a defendant's awareness of "the dangers and disadvantages of self-representation." *United States v. Bailey*, 675 F.2d 1292, 1300 (D.C. Cir. 1982). *See also, United States v. Peppers*, 302 F.3d 120, 133 (3rd Cir. 2002) (requiring the district court to make a "thorough inquiry, on the record, to assure itself that the defendant fully apprehends ... the perils of self-representation").

This split in the Circuits has produced a corresponding disparity among courts in the various states. Vermont, as we have seen, follows the totality of the circumstances analysis, in which *Faretta* warnings are only preferred by not required. Minnesota follows a similar approach, requiring a that a waiver of a defendant's right to counsel be made in writing, but refusing to find reversible error in the absence of a signed waiver if the facts and

circumstances surrounding the case make clear that the defendant's waiver was knowing and intelligent. *State v. Worthy*, 583 N.W. 2d 270, 276 (Minn. 1998).

On the other hand, many other states have adopted the more stringent standard that a *Faretta* warning be made on the record. Indeed, several of these states have codified the requirement that a defendant's waiver of counsel be made on the record, after a colloquy with the court, to determine if such a waiver is knowing and intelligent. *See, e.g. State v. Nichols*, 207 S.W. 3d 215, 224-225 (Mo.App. S.D. 2006) (analyzing RSMo. Section 600.051 that mandates at least six factors that must be explained to the defendant by the court to obtain a valid waiver.); *State v. Langley*, 109 Idaho 119, 122, 705 P.2d 1074, 1077 (Ct. App. 1985) (Explaining that Idaho Code §19-857 requires that a district court make a factual finding that the defendant is acting with full knowledge and awareness of the consequences of proceeding without counsel).

As is apparent from the foregoing, the split of authority on this issue is large and intractable. The issue of whether a court must make an on the record inquiry to determine if a defendant's waiver of counsel is knowing and intelligent, or whether they merely "should" make such an inquiry is a question of constitutional law, directly implicating a defendant's rights under the Sixth and Fourteenth Amendments. This split has had a debilitating effect not only on those state courts, such as the Vermont Supreme Court, that turn to the federal courts for guidance, but also for those state prisoners seeking relief under a writ of habeas corpus pursuant to 28 U.S.C. § 2254. *See, e.g. Dallio v. Spitzer*, 343 F.3d at 564-565 (holding that, because Faretta does not compel that specific warnings be given to a defendant seeking a waiver, the failure of a state court to give such warnings does not entitle him to habeas relief); *Moreno v. Stewart* 171 F.3d at 661 (same). The only way for the split of authority on this important issue to be resolved is for this

Court to resolve it. Thus, this Court thus should accept certiorari over this case to resolve the split of lower-court authority on this important issue.

II. THE COURT SHOULD GRANT THE WRIT TO DETERMINE IF THE VERMONT SUPREME COURT DECIDED THE QUESTION OF WETHER A WAIVER OF THE RIGHT TO COUNSEL OCCURRED IN A WAY THAT CONFLICTS WITH NEARLY EVERY UNITED STATES COURTS OF APPEAL

A. The Decision of the Vermont Supreme Court is in Conflict with Most, if Not All United States Courts of Appeal

While the various Circuit Courts may be split concerning the need to conduct an on the record examination of the defendant to establish if his waiver of counsel is knowing and intelligent, they are united in one key point – a defendant's desire to proceed *pro se* must be clearly and unambiguously stated on the record. Because the right to counsel is a fundamental right granted by the Sixth Amendment, courts are loathe to allow it to be waived absent a clear and unambiguous request. This is a basic threshold

from which all other analysis must necessarily flow. *See Cromer*, 389 F.3d at 680-681 (collecting cases); *Buhl v. Cooksey*, 233 F.3d 783, 790 (3rd Cir. 2000)("In order to overcome this presumption [against waiver of counsel], and conduct his/her own defense, a defendant must clearly and unequivocally ask to proceed *pro se*."); *Stano v. Dugger*, 921 F.2d 1125, 1144 (11th Cir. 1991)("There is simply no precedent in this Circuit for proceeding *pro se* by constructive notice without an obvious assertion of the right of self-representation."

The Vermont Supreme Court went exactly against this overwhelming body of federal law in finding that the defendant intended to proceed pro se, based not on a clear and unambiguous statement that he wished to do so, but rather on the Vermont Supreme Court's post-trial analysis of the "totality of the defendant's conduct." (App. A-9-10). By the Vermont Supreme Court's own admission, the defendant made "subsequent, but incomplete" requests for a public

defender prior to trial. Allowing the Vermont Supreme Court to engage in such post-trial, subjective parsing of the record in order to find a waiver of a Constitutional right is impermissible. This Court should grant certiorari to overturn the decision of the Vermont Supreme Court as contrary to clearly established holdings of the United States Courts of Appeals, including, but not limited to, that of the Second Circuit. *See Williams v. Bartlett*, 44 F.3d 95, 100 (2nd Cir. 1994).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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